

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SECOND APPEAL No 192 of 1981

with Cross Objections.

Date of decision: 16-6-1998

For Approval and Signature

The Hon'ble Mr. Justice S. K. KESHOTE

1. Whether Reporters of Local papers may be allowed to see the judgment?
2. To be referred to the Reporter or not?
3. Whether their Lordships wish to see the fair copy of the judgment?
4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 or any order made thereunder?
5. Whether it is to be circulated to the Civil Judge?

PRAVINCHANDRA P DAVE

Versus

HARJIVANDAS M SHAH

Appearance:

1. Second Appeal No. 192 of 1981
MR BHARAT J SHELAT for Petitioner
MR DD VYAS for Respondent No. 1

CORAM : MR.JUSTICE S.K.KESHOTE

Date of decision: 16/06/98

ORAL JUDGEMENT

This second appeal has been filed by the original plaintiff challenging therein the judgment and decree passed by the District Judge, Surat in Regular Civil Appeal No.103 of 1979 by which the District Judge partly allowed the appeal arising out of the judgment and decree passed by the Joint Civil Judge, Senior Division, Surat in Regular Civil Suit No.997 of 1971.

2. The brief facts of the case are that the appellant - plaintiff filed Regular Civil Suit No.997 of 1971 in the Court of Joint Civil Judge (J.D.), Surat, for permanent injunction restraining the defendant from making any ventilator or aperture in the disputed suit wall and for declaration that the dispute wall forms part of his property bearing Nondh No.3735/1/A. After recording evidence of the parties, learned trial Judge allowed the suit of the plaintiff in toto.

3. Aggrieved by the judgment and decree of the trial court, the defendant preferred Regular Civil Appeal No.103 of 1978 in the District Court at Surat. The District Judge partly allowed the said appeal, holding that the disputed wall forms part of property bearing Nonth No.3763 belonging to the defendant. Hence this second appeal by the original plaintiff.

4. The District Judge under the impugned judgment and decree held that the disputed wall is of the ownership of the defendant; but permanent injunction granted in favour of the plaintiff restraining the defendant from making any aperture or ventilator in the wall in queswtion has been confirmed. The appellant-original plaintiff filed this second appeal before this court challenging that part of the judgment of the first appellate court under which the disputed wall was held to be the property of the defendant. The respondents - defendants filed cross objection , challenging the judgment and decree of the first appellate court by which the defendant has been restrained from making any aperture or ventilator in the wall in question.

Heard the learned counsel for the parties.

5. Learned counsel for the appellant contended that the first appellate court has committed serious illegality in holding that the respondent-defendant is the owner of the

disputed wall. He has taken the court through the relevant part of the judgment of the first appellate court and contended that the finding recorded by the first appellate court to reach to the conclusion that the defendant is the owner of the suit wall is perverse. On the other hand the learned counsel for the respondent-defendant contended that it is a question of fact whether the disputed wall belongs to the plaintiff or the defendant and the learned first appellate court, after considering the evidence produced by both the parties, recorded the finding of fact and as such question of law, much less substantial question of law, does not arise in the present case and the appeal deserves to be dismissed.

6. I have given my thoughtful consideration to the submissions made by the learned counsel for the parties. Recital in the sale deed Exh.36, under which the disputed property has been purchased by the appellant- plaintiff shows that the previous sale deed of the year 1937 was delivered to the plaintiff when he purchased this property in the year 1958. The appellant-plaintiff has not produced the sale deed of the year 1937 which would have shown the position and situation of the property bearing Nondh No.3735/1. The sale deed of the year 1937 A.D. was in possession of the appellant-plaintiff, which was very relevant document for the purpose of ascertaining the real situation and position of the property bearing Nondh No.3735. Withholding of the said document by the appellant-plaintiff, despite the possession thereof, has rightly persuaded the first appellate court to draw adverse inference against the plaintiff. It is a case where the appellant-plaintiff has deliberately not produced the relevant and material documentary evidence which was in his possession, which would have thrown light on the position and situation of the property bearing Nondh No.3735/1. Property bearing Nondh No.3735/1 was part of property bearing Nondh No.3735 admeasuring 6096 sq.yds. It was an open space and known as Chandan Baag. It was sub divided into several plots. Evidence is there on the record of the case as found by the first appellate court that Mangaldas Ghelabhai had purchased the plot bearing NondhNo.3735/1 from its previous owner on 31st March, 1937 and thereafter he sold the said plot to Rangildas Vrajdas on 6-2-1947 by registered sale deed at Exh.51/2. The plaintiff purchased the said property on 29th April, 1958. Further evidence has come on record as noticed by the first appellate court that there was no built up portion or construction in Nondh No.3735 in the year 1925 AD. There was open space like garden in the aforesaid nondh. The appellant-plaintiff has come up with the case

that the disputed wall was 15 feet high. It is the case of the respondent- defendant, which has been accepted by the first appellate court, and the learned counsel for the appellant-plaintiff has been unable to demolish the said case, that the respondent - defendant had raised the disputed wall to 22 feet while constructing second floor and gallery of his house, which rest on the disputed wall. The appellant-plaintiff had not raised any objection thereto. In aforesaid facts, the learned first appellate Court has rightly observed that in case this disputed wall really belonged to the appellant plaintiff, then he would not have allowed the defendant to raise the height of the wall, and further more to put up gallery thereon.

7. The appellant-plaintiff, in his deposition admitted that the disputed wall is the compound wall of the property bearing Nondh No.3735. He also admitted that he did not know the measurement of this property. He further admitted that he had no knowledge about the condition of the property prior to 1958. The plaintiff has not examined the previous owner of the suit property. The surveyor has also not measured the properties bearing Nondh No.3735/1 and 3764 though the Court had specifically ordered for the same. The learned first appellate court has considered the document - sanad at Exh.105 and has rightly reached the conclusion that the two lines shown therein do not show existence of the said wall.

8. Taking into consideration the totality of the facts and circumstances of the case and the evidence which has come on record of the case, I am satisfied that the first appellate court has not committed any error or illegality in holding that the disputed wall does not belong to the plaintiff. No question of law, much less substantial question of law, does arise in this second appeal.

9. In the result the second appeal fails and the same is dismissed.

Heard the learned counsel for the respondent-defendant on the cross objections.

10. Though the wall was held to be belonging to respondent-defendant, the land just adjacent to the wall is of the ownership of the appellant-plaintiff. In the year 1971 the respondent -defendant tried to open aperture in the wall towards the land of the plaintiff and that gave rise to the cause of action to the plaintiff to file the suit. The respondent - defendant

has no right to open any aperture or ventilator or window, maybe for light and air, on the disputed wall towards the land of the appellant- plaintiff. The learned counsel for the respondent -defendant is unable to show how the defendant has any right to open such aperture or ventilator towards the land of the plaintiff. In view of these facts, both the courts below have not committed any illegality in issuing injunction against the respondent-defendant restraining him from opening any aperture or ventilator on the disputed wall towards the land of the plaintiff.

11. In the result the cross objection fails and the same is dismissed.

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